

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 13, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP713

Cir. Ct. No. 2012CV4166

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

QUINCY NERI,

PLAINTIFF-APPELLANT,

RODNEY RIGSBY,

PLAINTIFF,

V.

**TIMOTHY M. BARBER, LORI M. LUBINSKY, AXLEY BRYNELSON LLP,
FRANKENMUTH MUTUAL INSURANCE COMPANY, ANTHONY ANZELMO,
RURAL INSURANCE COMPANY, CATHLEEN A. DETTMAN, KEVIN
PALMERSHEIM, HALEY PALMERSHEIM, S.C., CARLEY
PEICH-KEISLING, BARRETT J. CORNEILLE, DAVID J. PLINER,
CORNEILLE LAW GROUP, LLC, GENERAL CASUALTY/QBE INSURANCE,
PETERSON, JOHNSON & MURRAY, S.C., ARCHITECTURAL BUILDING
ARTS, INC., MELINDA MONROE, STEVE LARSON, LESLEY SAGER,
ERIC FERGUSON AND WHITE SCHOOL STUDIOS,**

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Dane County:
JOHN W. MARKSON, Judge. *Affirmed and cause remanded with directions.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Quincy Neri appeals the circuit court’s dismissal of her complaint and judgments imposing sanctions for filing a frivolous action. Neri contends that her complaint stated claims and that sanctions were inappropriate.¹ We conclude that Neri’s complaint failed to state a claim and that sanctions were properly imposed. Accordingly, we affirm. Additionally, we grant the motion by the respondents for sanctions for a frivolous appeal.

Background

¶2 This action stems from Quincy Neri’s claim that she created an art glass sculpture for installation in the home of Linda Hughes. Neri claims a copyright to the sculpture, and has pursued a federal claim that others have infringed on that copyright. In this case, Neri claims damages based on the actions of the defendant insurance companies and attorneys in defending against Neri’s federal copyright lawsuit.² Specifically, Neri complains that the insurance companies failed to settle Neri’s copyright claims against their insureds, and

¹ While Neri asserts many wrongs against her, the only coherent arguments we decipher in her brief are that the circuit court erred by dismissing Neri’s complaint for failure to state a claim and that sanctions were not appropriate. Accordingly, we limit our discussion in this opinion to those two issues. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address inadequately briefed issues).

² Rodney Rigsby was also a plaintiff below, but has not appealed the circuit court’s decision.

alleges that the defense attorneys acted dishonestly in the federal case and that they violated rules of professional conduct.

¶3 Counsel for each of the defendants sent Neri statutory safe harbor letters explaining their views that Neri's action was frivolous, and that the defendants would move to dismiss and for sanctions if Neri did not withdraw her complaint within twenty-one days. *See* WIS. STAT. § 895.044(1)(b) (2011-12).³ Neri declined to withdraw her complaint. The circuit court dismissed Neri's complaint for failing to state a claim and imposed sanctions. Neri appeals.

Discussion

¶4 When we review an order dismissing a complaint for failure to state a claim, we assume the truth of the facts asserted in the complaint. *See Putnam v. Time Warner Cable of Se. Wis.*, 2002 WI 108, ¶11, 255 Wis. 2d 447, 649 N.W.2d 626. ““Unless it seems certain that no relief could be granted under any set of facts that the plaintiff could prove, dismissal of the complaint is improper.”” *Id.* (quoted source omitted). Because the facts asserted in Neri's complaint do not set forth any cognizable claim, the complaint was properly dismissed.

¶5 Neri asserts that she has stated a claim against the named insurance companies for failing to settle Neri's federal copyright claim. Neri asserts that the insurance companies are liable to Neri for breach of contract and negligence because the insurance companies acted in bad faith by failing to settle Neri's copyright claims against their insureds.

³ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶6 Under well-settled Wisconsin law, a third party who has asserted a claim against an insured cannot bring a bad faith claim against the insured's insurance company. Our supreme court has plainly stated: "The insurer's duty of good faith and fair dealing arises from the insurance contract and runs to the insured. No such duty can be implied in favor of the claimant from the contract since the claimant is a stranger to the contract and to the fiduciary relationship it signifies." *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis. 2d 56, 73, 307 N.W.2d 256 (1981). Thus, the court explained: "In the absence of any such duty, the third-party claimant cannot assert a claim for failing to settle h[er] claim" *Id.* at 74. Accordingly, Neri's claims premised on the insurance companies' bad faith for failing to settle Neri's copyright claims against the insurance companies' insureds fail as a matter of law.

¶7 Neri also asserts that she has stated claims for fraud by alleging that the copyright defendants took credit for Neri's glass sculpture and that the attorneys who represented those defendants in Neri's federal copyright action acted dishonestly in that case. Neri asserts that the copyright defendants fraudulently used Neri's work as their own. She also asserts that the copyright defense attorneys withheld discovery that would have allowed Neri to win her federal case and that they made false representations to the court in defending their clients.

¶8 A claim of fraud requires the following elements:

(1) the defendant made a factual representation, (2) which was untrue, (3) the defendant either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false, (4) the defendant made the representation with intent to defraud and to induce another to act upon it, and (5) the plaintiff believed the statement to be true and relied on it to his/her detriment.

Williamson v. Hi-Liter Graphics, LLC, 2012 WI App 37, ¶13 n.6, 340 Wis. 2d 485, 811 N.W.2d 866. Additionally, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” *See* WIS. STAT. § 802.03(2). Thus, a plaintiff must plead “the ‘who, what, when, where and how’” of a fraud claim. *Friends of Kenwood v. Green*, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271 (quoted source omitted).

¶9 Here, Neri’s complaint does not set forth any facts that would support a claim that any defendant made a false representation to Neri that induced Neri to act to her detriment. Rather, Neri’s complaint sets forth vague assertions that the defendants were dishonest in connection with the glass sculpture and the federal litigation. Neri does not set forth any specific false representation to Neri, nor does she set forth any actual *reliance* by Neri on a false statement. Accordingly, Neri has not stated a claim for fraud.⁴

¶10 Finally, Neri asserts that she has stated a claim against the defense attorneys in this case by asserting that the attorneys are representing multiple defendants with conflicts of interest. She also asserts that the attorneys violated supreme court rules related to expediting litigation, fairness to opposing parties,

⁴ Neri’s complaint is lengthy and largely incoherent. We do not attempt to set forth all of the complaint’s factual allegations in this opinion. As to Neri’s claims of fraud, Neri sets forth conclusory allegations such as the following: the attorneys “committed fraud on [Neri] and on the court in their dishonesty calculated for their own advantage during the litigation” of Neri’s federal copyright case; the attorneys further committed fraud by “keeping the declarations of Amy Radspinner and Lesley Sager to themselves when [Neri] requested such information in discovery” and because “[a]t all times all [d]efendants[] had the information that would give [Neri] the win and purposely withheld it.” Additionally, Neri claims: “All [d]efendants[] answered discovery with false statements, knew their answers were untrue and intended to deceive [Neri by] not disclosing crucial facts and information such as Hughes, Radspinner and Sager’s declarations.” These vague and conclusory allegations are insufficient to support a claim of fraud.

and respect for the rights of third parties in the course of the federal copyright litigation.

¶11 Neri’s claim that the defense attorneys have conflicts of interest among their own clients goes nowhere. Neri does not even attempt to argue that a conflict among the defense attorneys’ clients would give rise to a claim by Neri, but rather merely asserts that the conflicts exist. As to Neri’s claims that the defense attorneys violated various supreme court rules, it is sufficient for us to note that the preamble to the rules specifically states that the rules are not a basis to impose liability. *See* SCR ch. 20, Preamble: A Lawyer’s Responsibilities. Moreover, to the extent Neri attempts to assert any claims against the defense attorneys in Neri’s federal copyright action, those claims fail based on Neri’s failure to sufficiently plead any fraudulent conduct. *See Yorgan v. Durkin*, 2006 WI 60, ¶27, 290 Wis. 2d 671, 715 N.W.2d 160 (“[T]he well established rule of law in Wisconsin is that absent fraud or certain public policy considerations, an attorney is not liable to third parties for acts committed in the exercise of his duties as an attorney.” (quoted source omitted)). We conclude that Neri’s complaint does not provide any basis to hold the defense attorneys liable for their conduct in defending their clients in federal court.

¶12 For the reasons explained, we determine that Neri’s complaint does not state a claim.⁵ We turn, then, to Neri’s claim that sanctions were improperly imposed.

⁵ Neri’s complaint also sets forth a separate tort claim for “emotional distress.” Neri does not pursue that claim on appeal.

¶13 Neri argues that her claims have merit and that she has a due process right to pursue her claims. She also asserts that sanctions should not be imposed to further punish injured parties. In essence, Neri's argument as to sanctions is a challenge to the circuit court's determination that Neri's claims are frivolous.

¶14 We conclude that Neri either knew or should have known that her claims had no basis in existing law or a good faith argument for the extension of existing law. *See* WIS. STAT. § 895.044(1)(b). Neri's complaint is so woefully inadequate that any reasonable person, even untrained in law, should have recognized that it had no basis in law. Accordingly, sanctions were mandatory after Neri was served safe harbor letters and failed to withdraw her complaint. *See* § 895.044(2)(b).

¶15 Additionally, we conclude that the circuit court properly exercised its discretion in determining that sanctions were also appropriate under WIS. STAT. § 802.05. *See Keller v. Patterson*, 2012 WI App 78, ¶¶20-23, 343 Wis. 2d 569, 819 N.W.2d 841, *review denied*, 2013 WI 6, 345 Wis. 2d 405, 827 N.W.2d 95. The court explained that Neri's complaint failed based on the simple premise that, following defeat in one lawsuit, "you cannot sue the lawyers representing the prevailing parties just because you lost." As the court explained: "The fact that you differ with that result, the fact that you even differ with their methods, the fact that you don't like what they did ... doesn't give rise to a lawsuit." This is not a complicated legal concept. Even a person with no special legal training is expected to understand that losing a lawsuit does not give rise to a legal action against those who successfully defended that action. Because even a cursory inquiry into the facts and law would have revealed that Neri's claims are baseless, sanctions were appropriate under § 802.05(3).

¶16 Finally, we address the respondents’ motion for sanctions for a frivolous appeal. The respondents request that we find this appeal frivolous under WIS. STAT. RULE 809.25(3) and enter an order awarding the respondents their attorney fees and costs. The respondents further request that we enter an order barring Neri from suing any of the respondents in connection with the facts related to Neri’s federal copyright lawsuit until Neri satisfies all judgments and fees entered against her. We agree that the requested remedies are appropriate.

¶17 WISCONSIN STAT. RULE 809.25(3)(a) states that, if this court finds an appeal is frivolous, the court “shall award to the successful party costs, fees, and reasonable attorney fees under this section.” In an appeal from a ruling of frivolousness, we need not determine whether the appeal itself is frivolous before we can award appellate costs and reasonable attorney fees. *Riley v. Isaacson*, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). Rather, if we determine the claim was properly found frivolous by the circuit court, it is frivolous per se on appeal. *Id.* Because we conclude that the circuit court properly found Neri’s complaint frivolous, Neri’s appeal asserting the merits of her complaint is also frivolous. Accordingly, we remand to the circuit court for a determination of the respondents’ costs and reasonable attorney fees.

¶18 “If we determine that an appeal is frivolous, we also have the ability to bar the party in question from commencing further proceedings in this court and in the trial court until the costs, fees, and attorney fees that we award are paid in full.” *Schapiro v. Pokos*, 2011 WI App 97, ¶21, 334 Wis. 2d 694, 802 N.W.2d 204. In light of Neri’s insistence in pursuing the frivolous claims in this case, and in recognition that Neri is currently pursuing two similar appeals—appeal numbers 2013AP1112 and 2013AP1818—we determine that sanctions are appropriate here. We believe this strikes the necessary balance between Neri’s right of access to the

courts and the respondents' interest in finality, as well as recognizing "the taxpayers' right not to have frivolous litigation become an unwarranted drain on their resources and the public interest in maintaining the integrity of the judicial system." See *Minniecheske v. Griesbach*, 161 Wis. 2d 743, 749, 468 N.W.2d 760 (Ct. App. 1991).

Conclusion

¶19 We affirm the judgments of the circuit court and conclude that the respondents are entitled to their costs and reasonable attorney fees on appeal under WIS. STAT. RULE 809.25(3). We remand to the circuit court to determine the proper amount. Further, we bar Neri from commencing proceedings in this court and the circuit court arising from, relating to, or involving the respondents and the facts connected to Neri's federal copyright claim until Neri satisfies the judgments against her in this case both previously entered and any entered pursuant to our directives today. The clerk of this court is instructed to return, unfiled, any document submitted by Neri relating to any matter arising from, relating to, or involving the respondents and Neri's federal copyright claim. On remand, the circuit court shall enter whatever order is necessary to give direction to the clerk of the circuit court relating to this opinion's prohibition on future filings by Neri. The clerk of this court will resume accepting Neri's documents for filing if the documents are accompanied by an order of the circuit court indicating that Neri has paid all of the costs, fees, and reasonable attorney fees awarded prior to and pursuant to our decision today in connection with this case.

By the Court.—Judgments affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

